No. 81-746, 81-1172

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-746

CITY OF AKRON, *et al.*,
Petitioners,

— v. —

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., *et al.*,
Respondents.

No. 81-1172

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., *et al.*,
Petitioners,

— v. —

CITY OF AKRON, *et al.*
and
FRANCOIS SEGUIN, M.D., *et. al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS IN SUPPORT OF THE PETITIONER IN NO. 81-746 AND THE RESPONDENTS IN NO. 81-1172

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INTERESTS OF THE AMICUS CURIAE

The Catholic League for Religious and Civil Rights is a non-profit voluntary association, national in membership, organized to promote goodwill and harmonious relations in the community, to combat all forms of religious prejudice and discrimination and to defend the human rights and sanctity of each human life.

SUMMARY OF ARGUMENT

I. *The Abortion Cases* cannot and do not preclude the legislature from making a value judgment as to the dignity of each human life regardless of whether the life is discarded. The nature of the act of abortion, the consequent loss of a human life and the intrinsic value of each human life, may be recognized by the legislature and appropriate statutory provisions enacted providing for the humane disposal of aborted human remains.

II. Because of the devastating impact on minorities disproportionate to the rest of the population of the presen abortion policy, and the erroneous factual and legal base of the *Roe* v. *Wade* decision, *Roe* v. *Wade* and its progeny are not sound enough to be relied upon under any theory of "substantive due process" to deny the legitimacy of a reasonable, legislative response to the problem of the humane disposal of aborted human remains.

ARGUMENT

I. Legal Provision for the Humane Disposal of Aborted Human Remains is Constitutional.

The Sixth Circuit in *Akron Center for Reproductive Health, Inc. v. City of Akron*, 651 F.2d 1198, 1211 (6th Cir. 1981), struck down § 1870.16 of the Akron Ordinance requiring that "Any physician who shall perform or induce an abortion upon a pregnant woman shall insure that the remains of the unborn child are disposed of in a humane and sanitary manner," as void for vagueness.

Arguably, expecting an elemental understanding of "humane" by abortion providers or "abortionists," *Colautti v. Franklin*, 439 U.S. 379 (1979) (White, J., Burger, C.J., Rehnquist, J., dissenting at 403, 408, 409), may be too much to base criminal sanctions on, particularly given the inhumane aspects of the abortion profession. B. Nathanson, M.D., *Aborting America*, 97-145 (1979); Kaltneider, et al, *The Impact of Mid-trimester Abortion Techniques on Patients and Staff*, Am. J. Orthopsychiatry, July 1971 at 620-626. Given the mind-set addressed, more specificity may be required in such an ordinance than might be required in common human understanding. While there are certain problems in requesting and trusting one who is an abortion provider to understand and comply with treating a human fetus, just aseptically terminated by him, in a humane manner, i.e., a manner "marked by compassion, sympathy, or consideration for other human

beings or animals," *Webster's Third New International Dictionary* 1100 (1965), any ruling should make clear that the state may recognize the value of those human beings at the stage of development they are.

However, in striking down the "humane disposal" provision on the grounds of "vagueness," the Sixth Circuit indicates that an essential basis of the ruling was the court's objection "to mandat[ing] some sort of 'decent burial' of an embryo at the earliest stages of formation." *Akron Center*, 651 F.2d at 1211. Such language impliedly aligns the Sixth Circuit with the district court in *Margaret S. v. Edwards*, 488 F. Supp. 181, 222 (E.D. La. 1980), which explicitly held that humane disposal provisions were unconstitutional because they recognized a value in the human fetus.

Two issues are presented by § 1870.16 of the Akron Ordinance.

First, there is the standard question of "vagueness," interestingly stated in that abortionists are asked to humanely dispose of their target.

Secondly, there is the hidden issue addressed clearly in *Edwards*, and by implication in the Akron decision now before the Court that the "right" constructed in *Roe v. Wade*, 410 U.S. 113 (1973) constitutionally precludes the state from recognizing value in the human embryo or human fetus and in making any statement of that value judgment.

This is the issue as to humane disposal addressed in this brief by the amicus to the Court.

In *Leigh v. Olson*, 497 F. Supp. 1340 (D.N.D. 1980) the court acknowledged that the state may regulate the disposal of a dead fetus, but held the

involvement of the woman in the process unduly burdened her decision.

The humane disposal provisions of the statutes in *Edwards* and in *Leigh* differ distinctly from those in the Akron Ordinance in that the woman is not involved in the humane disposal decision under the Akron Ordinance. Therefore, the ordinance clearly does not interfere at all with the woman's decision whether to terminate her pregnancy -- making it unnecessary to assess whether such potential interference would be "unduly burdensome." *Maher* v. *Roe*, 432 U.S. 464, 474 (1977).

A review of the underlying and unspoken presupposition of the newly constructed abortion liberty that human life before birth is valueless and legally nonexistent will illustrate how humane disposal of the fetus or embryo sums up the continuing confrontation over abortion in our society, a clash which will continue to exacerbate as long as judicial involvement remains prominent.

* * *

"We need not resolve the difficult question of when life begins." *Roe* v. *Wade*, 410 U.S. at 159.

"The lie is the specific evil which man has introduced into nature. . . . The lie is our very own invention, different in kind from every deceit that the animals can produce." Martin Buber, quoted in Rosenblum, *Coercion in Liberation's Guise*, in Abortion and Social Justice 143, 146 (Hilgers, Horan eds. 1972).

Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being -- of a being that is alive and is a member of the human species. There is overwhelming agreement on this point in countless medical, biological, and scientific writings. Extensive quotation from such writings would be unnecessarily redundant except for the strenuous efforts by some parties to deny or to obscure this basic fact. . . . If the United States government is to give reasonable consideration to the abortion issue it must start from the fact that unborn children are human beings. . . . No governmental body that approaches the abortion question with honesty can accept semantic gymnastics that obscure the real issue. Any suggestion that some human beings can be 'nonpersons' under the law simply echoes the holding of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), a decision the fourteenth amendment was intended to reverse. Senate Committee on the Judiciary, *The Human Life Bill* -- S. 158, S. Rep. No. J-97-16, 97th Cong., 1st Sess. 7, 13, 24 (1981).

It is worth noting that of all the twenty-two expert witnesses who testified before the Senate Subcommittee on the Separation of Powers . . . on the medical and biological questions, none ever claimed that unborn children are not alive nor that they belonged

> to any other species than human, or even that they were part of the mother rather than a distinct individual human being. . . . Wasn't the significance of the birth of Louise Brown that her conception was in a test tube? Hyde, *The Human Life Bill* Spring 1982 The Human Life Review, 6 at 7, 10.

Then, on January 11, 1982, Newsweek magazine showed a picture of an eight week old human embryo on its cover entitled, "How Life Begins" and announced, in the mass media market, *despite* the "difficult question of when life begins," *Roe v. Wade*, 410 U.S. at 159, that *human life begins at conception.*

> If newborns could remember and speak, they would emerge from the womb carrying tales as wondrous as Homer's. They would describe the fury of conception and the sinuous choreography of nerve cells, billions of them dancing pas de deux to make connections that infuse mere matter with consciousness. They would recount how the amorphous glob of an arm bud grows into the fine structure of fingers agile enough to play a polonaise. They would tell of cells swarming out the nascent spinal cord to colonize far reaches of the embryo, helping to form face, head and glands. The explosion of such complexity and order -- a heart that beats, legs that run and a brain powerful enough to contemplate its own origin -- seems like a miracle. It is as if a single

dab of white paint turned into the multi-colored splendor of the Sistine ceiling. *How Human Life Begins*, Newsweek, Jan. 11, 1982, at 38.

Still, the unborn child, who in Dean Prosser's words is as much a person in the path of an automobile as his mother, is declared non-existent before the abortionist's scalpel and fee. *Floyd v. Anders*, 440 F. Supp. 535 (D.S.C. 1977). He is spoken of as a child by the government on posters in liquor stores warning that alcohol may be hazardous and in appeals from the March of Dimes, "Take care of your baby before he is born." Yet this amorphous blob of paint that becomes the "multicolored splendor of the Sistine ceiling" is not a person before the law, while General Motors is.

Such an anomaly will not long last, for we will not begin to ask pregnant women "How's your fetus?" any more than we will come to feel a poetic bonding to General Motors as person to person.

We know. The whole world knows. All creation knows.

This is *why* the question of "humane disposal" raises hackles -- because it forces a confrontation with the act itself. (*See* President's letter, *infra*, p. 15.) What is it that we are doing and what is this embryo -- blob -- tissue or whatever? We cannot in one breath recognize it as a blob of paint turning into the "multicolored splendor of the Sistine ceiling" and in another, chuck it in a waste disposal. It is something -- a fact we do not care to admit, particularly when we go to kill.

As a point of constitutional right one might certainly state that each of us has a constitutional right to lie to himself. The law does not require one convicted to personally admit that he acted wrongly. Likewise, the fact that a woman contemplating abortion internally knows it is the taking of human life does not mean that she should externally acknowledge the action. *See* Senate Committee on the Judiciary, *The Human Life Federalism Amendment* S.J. Res. 110, S. Rep. No. 465, 97th Cong., 2d Sess. 42, 50 (1982) and polls cited therein.

However, it should be clear that though an individual may have a right to lie to himself, there is no right attached to any individual to demand that society at large give public acceptance to that lie. Those who wish to avail themselves of the abortion liberty have no right to demand that the rest of us deny what they are doing, or that the rest of us act as if nothing were occurring. Such a view of the abortion liberty would certainly be overstated and patently inaccurate as to the fact of killing that is occurring. It would articulate an apocalyptic commitment to abortion that is almost mystical.

Indeed the opposition of the abortion providers to humane disposal raises a question of their own comfortableness with the materialistic philosophy. Jancin, *Emotional Turmoil of Physicians, Staff Held Biggest D & E Problem*, Ob. Gyn. News, Dec. 15, 1981, at 1, 16. If "it" really is a blob, a speck of flesh, a hank of hair, "potential anything" and nothing more, why care how it is disposed of? If someone wished to

wished to pass a statute for the humane disposal of appendixes, so what?

In their opposition to the provision of humane disposal for the "abortus," the "conceptus," the blob, are the abortion providers showing a desire that the public assuage their own consciences? If so, they are perhaps better than their actions.

Then again, they may be truly committed to infecting all with their evil — to wringing from each a statement that each human life has no intrinsic worth -- an *auto de fe* for the Secularist Creed, prior to the aseptic and clinical incineration of varying classes of life. However, in the twentieth century's scientific orthodoxy of "man is the measure of all things," an act of obeisance to the lie will not save you, but damn you.

The true target of those oppposed to the "humane disposal" concept is not what is done with the human "material" but that the human soul be attacked.

What about our soul?

Yes, that is what is written -- soul.

In the positivistic legal world it is a taboo to mention "it" as well -- somehow unbecoming in a brief to a court. The established orthodoxy demands that we act as though there were no God (an empirically absurd position) and that we have no soul.

While scientists ponder the Shroud of Turin or the heavens for proof, R. Jastrow, God and the Astronomers (1978), the shocking evidence of our spiritual nature bursts forth in the scientific twentieth century's testimony of Auschwitz, the Gulag, Cambodia, and Nagasaki. And once we admit that recognition of evil demanded by

the events of this century, we know *God is* and *we are* -- and we know the stakes of the conflict.

As Elie Wiesel heard intuitively on entering a concentration camp as a prisoner: "The soul is important and the enemy knows it; that's why he tries to corrupt it before destroying us. Do not let him." E. Wiesel, One Generation After, 79-80 (1970).

By their public positions against humane disposal, abortion providers show how they internalize the knowledge of killing. In accepting the responsibility of killing, the abortion advocate is driven by a dynamic much like the slaveholders of old. Slavery was once apologetically defended as a "necessary evil." Its actual evil nature compelled it to advocate itself as a "positive good."

Similarly, as with slavery, we have watched abortion move from being a drastic measure, a last resort, a necessary evil, an unfortunate occurrence -- to being "a fundamental right" upon which a vast industry of death is built. The term "abortion choice" becomes layered with a nonsensical attitude as though it is something that everyone should have along with the chicken in every pot and the car in every garage. The seeds of its own undoing are thus laid.

> Since the old ethic has not yet been fully displaced it has been necessary *to separate the idea of abortion from the idea of killing*, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is

> continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under *socially impeccable auspices. A New Ethic for Medicine and Society*, 113 California Medicine 67, 68 (1970). (emphasis added)

In *Edwards*, 488 F. Supp. 181, the attempt to separate "the idea of abortion from the idea of killing" is carried through under the "socially impeccable auspices" of the federal judiciary. However, due to the remaining stature of the judicial role which has not been completely depleted, the "socially impeccable auspices" of a court accentuates the "ludicrous" nature of the rationalization.

> Such a question (burial or cremation) *equates the abortion process with the taking of a human life*, because fetal remains are required to undergo the same *elaborate formalities* of burial or cremation which are traditionally reserved for deceased persons. *Id.* at 222. (emphasis added)

Not only are we told that abortion is not killing, but now we are told that a funeral, the grieving process for the living, the recognition of the value of the person and the intrinsic worth of the human made in the image of God -- all this is nothing but an "elaborate

formality." What then, does this mean: that a human body with no remaining human contacts may be cast away as a crumpled Dixie Cup?

We began by denying we knew when life begins; we then denied the fetus is a person; then we denied "it" was a human being; and then, not only in the face of God did we deny its humanity (for who cares of such blasphemy in this century of Progress), but in the face of the findings of the Ethics Advisory Board (a regulatory agency of the United States government itself — perhaps even a "person" under the law?), we even deny "it" the "profound respect" to which the *Report of the Ethics Advisory Board on HEW Support of Research Involving Human In Vitro Fertilization and Embryo Transfer*, 44 Fed. Reg. 35033, 35056 (June 18, 1979) says "it" is "entitled".

We began by denying humane disposal to "it" and now we mock such disposal of ourselves as "elaborate formalities." In following this trend we need not fear such "elaborate formality" will continue to be "traditionally reserved" for any of us, for after all, there are careers to pursue, cases to be argued and decided, and "getting and spending." We shall "let the dead bury the dead," not because we are concerned with eternal life, but because we no longer believe in it at all, or even life here and now or anything.

"Since the fetus is not a person, neither is it a human being," *Edwards*, 488 F. Supp. at 222. The statement enshrined in the West Reporter leaps from the pages, and unless one is either stupid or evil it can only be read with tears or hilarity. Tears for when the reader feels and laughter when he thinks.

Not content with the foolishness inherent in once saying a human fetus is not a human being, the court says it again by criticizing the humane disposal statute for "impermissibly" raising "the status of a fetus to that of a human being by using language equating fetal remains with human remains . . ." *Id.*

Observe how the court uses "fetus" as a noun *unmodified*, in contrast to "being" as a noun modified by "human".

The question to be asked is what kind of fetus? — if it is a variety of animal fetus then certainly such a fetus can't be raised to the level of a human being or lowered thereto.

Because these are humans, however, who are obtaining abortions, their fetuses are human and no statute does or can raise them to the level of human beings because by all definitions a *human* fetus is a *human* being. A dog fetus is a *dog* being. A *cow* fetus is a *cow* being. A *horse* fetus is a *horse* being. The principle is rather consistent.

Observe again how the sentence then uses "remains" as a noun modified by "fetal" to contrast with "remains" modified by "human", as if there were some natural opposition between the two. What kind of "fetal" is opposed to "human"? Certainly not a "human fetus" or a "fetal human". If the subject matter for disposal is a human fetus, then the remains are fetal *and* human. The remains can't be fetal *or* human -- they are either human or non-human, fetal or non-fetal. Human and fetal are not mutually exclusive words.

The verbiage of *Edwards*, competes with Judge Clement Haynsworth's statement in *Floyd v. Anders*, 440 F. Supp. at 539, that ". . . the Supreme Court declared the fetus in the womb is neither alive nor a person within the meaning of the fourteenth amendment."

Overlooking for a moment the jurisdictional requirement, if it were true that the unborn were not alive, the alleged need for abortions under any theory would be obviated. In fact everything would be obviated.

Does human language have to be aborted along with the human fetus?

> If the factual concepts on which legal decisions are based are mandatorily defined in ways which can support only the results reached, the possibility of reasoned public criticism is eliminated. Professor Richard Stith, Valparaiso University School of Law, quoted in S. Rep. No. 465, *supra* at 47.

Recently in Corpus Christi, Texas, two legally aborted fetuses discovered in a garbage dump were released by authorities for burial. Just as a nation honors her dead abroad and seeks them out whether they be missing in a Southeast Asian jungle or victims of fashionable leftist quackery in San Francisco and South America, so does the continued spectacle of the aborted unborn require us to act in a fitting and proper manner toward the dead.

On May 5, 1982 President Reagan gave public recognition to 17,000 dead kept in containers, labeled in

jars, found in Los Angeles when a storage container broke open. In a letter to a Dr. Philip B. Dreisbach the President stated:

> I have received your letter and I want you to know of the great horror and sadness evoked by the incident you described. When all is said and done, being confronted with the reality of abortion and its consequences removes all trace of doubt and hesitation. The terrible irony about this sudden discovery is not that so many human lives were legally aborted, but that they are only a tiny proportion of the 1.5 million unborn children quietly destroyed in our nation each year. This is the truth many would rather not face.
>
> Your decision to hold a memorial service for these children is most fitting and proper. On such an occasion, we must strengthen our resolve to end this national tragedy. I am hopeful that evidence like that found in California will move those who have thus far preferred silence or inaction and encourage them to agree that something must be done. I have expressed my anticipation that Congress act expeditiously on this matter and approve a measure which will remove this evil, and all its vestiges, from our society.
>
> Thank you for writing, and may God bless you in all your efforts.

In this same instance, a judge on June 29, 1982 issued a preliminary injunction restraining Los Angeles County from releasing "fetal tissue" for burial, pending trial, as plaintiffs "will suffer severe and irreparable injury." *Feminist Women's Health Center, Duncan Donovan, Atheists United, v. John Van de Camp*, No. 413606, Los Angeles Superior Court (June 29, 1982).

The acts of the officials remain on record and there can be no doubt of the emerging consensus. The people as human beings will recognize the intrinsic worth of the *human* as did the President.

If we are "a deeply religious people," *Zorach v. Clausen*, 343 U.S. 306 (1952) and a "society that . . . strongly affirms the sanctity of life," *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) surely individuals should at least be able to have a memorial service without necessitating first the removal or consideration of a preliminary injunction.

The view that humane disposal provisions are unconstitutional because they recognize a value in the human fetus "misconceive[s] the nature and scope" *Maher*, 432 U.S. at 471, of the judge-made right in *Roe v. Wade*. This Court has not yet held that the State must regard and treat the human fetus by public proclamation or indifference as utterly lacking in human aspect or dignity.

Nothing in the Constitution or in the decisions of this Court thus far forbids a state's recognition of the fact that the human fetus is human life or forbids a state to act on that view except *to the extent* that

its acts might "override the rights of the pregnant woman that are at stake." *Roe v. Wade*, 410 U.S. at 162. Presumably those rights of the woman at this time are to terminate pregnancy prior to term, and *not* to demand that society financially underwrite her decision *Harris v. McRae*, 448 U.S. 297 (1980); or applaud by pretending "the human embryo" is not "entitled to profound respect" as the *Report of the Ethics Advisory Board, supra* at 35056 concluded "it" was. The newly claimed "right" "implies no limitation on the authority of a State to make a value judgement." *Maher*, 432 U.S. at 474.

II. A Humane Disposal Statute Related To Aborted Human Remains is a Legitimate Matter of Legislative Judgment.

In *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963) it was hoped this Court had buried the discredited doctrines of "substantive due process" of *Lochner v. New York*, 198 U.S. 45 (1905) by which "the Court, and not the legislature became the final judge of what might be law . . ." R. Jackson, The Struggle for Judicial Supremacy 70 (1931).

In *Ferguson*, 372 U.S. at 731-732, the Court said:

> We refuse to sit as a "super-legislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to

> strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a peculiar school of thought."

However, "substantive due process" apparently retained "potential life," for in *Roe v. Wade* and its progeny, "substantive due process," with the Court as a "super-legislature to weigh the wisdom of legislation," came back with a vengeance, striking down abortion laws "out of harmony with a peculiar school of thought." *Id.*

John Hart Ely, in *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920, 935 (1973), observes that the Court manufactured a "super-protected" right "not inferable from the language of the Constitution" and then afforded the improvident and extravagant liberty "more stringent" protection than "the present Court accords the freedom of the press explicitly guaranteed by the First Amendment."

> While I would hesitate to argue that one *(Roe* or *Lochner)* is more defensible than the other in terms of judicial style, there *are* differences in that regard that suggest *Roe* may turn out to be the more dangerous precedent." *Id.* at 940.

"More dangerous" because the "fundamental right" fiction attempts to insulate the claim from rationality tests and requirements.

The actions of the Court in reviving "substantive due process" have impressed upon a whole people and vulnerable minorities the Court's "concepts of the socially desirable, the publicly acceptable, and the morally sound, with a touch of the devil-take-the-hindmost." *Beal v. Doe*, 432 U.S. 438, 462-63 (1977) (Blackmun, J., dissenting).

Polls show black people to be more strongly against abortion than other groups. Senate Judiciary Committee Report, No. 465, *supra* at 48; *Black Stand on Abortion*, New York Daily News, March 12, 1978, yet from their number come the most abortions in a stunningly disproportionate ratio.

Could subtle coercion and upper class manipulation of racial and sexual self-hatred be a factor in the contrast between the level of opposition to abortion and the level of utilization of abortion?

"Non-white women obtain abortions at nearly double the rate of whites . . ." *McRae*, 448 U.S. at 343 (Marshall, J., dissenting). Citing this, the dissent then called for "more searching judicial inquiry" along lines of an *impact* test so as to mandate funds for abortion on the grounds of discrimination!

Others observing this disproportionate rate of abortion among non-whites have wondered too -- not about alleged discrimination in *not* financing the killing off of a generation, but at the obvious discrimination in *financing* such a program, the net *impact* and *result* of which is the elimination of the minority -- admittedly by subtle coercion and democratic selection, but still the *impact* and *result* exposes the program for its inherent racism. Novak, *How*

Placidly They Accept Aborting So Many Black Babies (November 14, 1976) *reprinted* in Spring 1978 The Human Life Review 95.

The black population ". . . suffers a disproportionate share of the psychological effects of abortion upon mothers and upon other children." *Id. See also,* Freeman and Graves, *Risk of premature delivery among indigent Negro women based on past reproductive performance,* Obstet. Gynecol. 34: 648 (1969); Iffy, *Perinatal Statistics: The Effect Internationally of Liberalized Abortion,* in Hilgers, Horan, and Mall, New Perspectives on Human Abortion, 92-127, at 118, 119 (1981).

The evidence increases of this "brutal effect." *Beal,* 432 U.S. at 460 (Marshall, J., dissenting). Surely, "at some point a showing that state action has a devastating impact on the lives of minority racial groups must be relevant." *Jefferson* v. *Hackney,* 406 U.S. 535, 558, 575-576 (1972) (Marshall., J. dissenting).

> Black women are being aborted at a rate 2.5 times greater than any other ethnic group in New York City. Why? They are not being given the freedom to say no! They are being coerced into destroying their children! This must come to an immediate halt! Then, an investigation should be carried out, and those responsible should be brought to trial for one of the most ghastly crimes of this century. Erma Clardy Craven, *Abortion, Poverty and*

Black Genocide: Gifts to the Poor? Abortion and Social Justice, *supra* at 240.

". . . there truly is 'another world' 'out there', the existence of which the Court, I suspect, either chooses to ignore or fears to recognize . . ." *McRae*, 448 U.S. at 348, citing *Beal*, 432 U.S. at 463 (Blackmun, J., dissenting).

It is time the world "out there" of welfare coercion, of those enslaved in a new urban plantation system be recognized for what it is. And those afraid to recognize it for what it is are its administrators and their governmental supporters, whose power and influence depend on a continuing and self-perpetuating caseload without regard to human cost.

Under National Socialism abortion was promoted for Jewish and East European women only, not German women. William C. Brennan, *Medical Holocaust: Exterminative Medicine in Nazi Germany and Contemporary America*, Vol. I, 79, 80, 99, 124, 135 (1981). Governments, classes and cliques provide abortion as social policy for those for whom they do not care. The real world "out there" and "in here" is relentless in its vicious destruction, in the name of compassion and progress.

Abortion for "penniless pregnant women," *Beal*, 432 U.S. at 454 (Brennan, J., dissenting) is the epitome of "ethical bankruptcy". *Id.* at 456 (Marshall, J., dissenting).

The "peculiar school of thought" *Ferguson*, 372 U.S. at 732, requiring "a troubling journey into the realm of substantive due process," *Scheinberg* v. *Smith*, 659

F.2d 476, 484 (5th Cir. 1981) trots out many themes -- welfare costs, poverty and child abuse, health and privacy, among others. These legislative policy arguments must be examined so that the basic nature of the humane disposal question not be similarly misconstrued by increased court involvement on the authority of *Roe v. Wade*, a case with such an inadequate base in law and fact that in time it will be disavowed.

It has been argued in governmental bodies legislative and judicial that there should be a pro-abortion policy because of "the welfare costs that will burden the state for the new indigents and their support in the long, long years ahead . . . And so the cancer of poverty will continue to grow." *Beal*, 432 U.S. at 463 (Blackmun, J., dissenting).

This cost-benefit analysis is mirrored well in Problem 95 in a mathematics textbook in use in Germany in the 1930's:

> Problem 95. The construction of an insane asylum required six million RM. How many new housing units at 15,000 RM each could have been built for this sum? Adolf Dorner, Mathematik en Diensteder Nationalpolitischen Erziehung (1935).

There are unanticipated consequences to such an attitude, as the West German Court noted in finding an abortion statute unconstitutional. That court stated that its ruling could "be understood only in light of the historical experience and the spiritual-moral confrontation with the previous system of National

Socialism." Jonas and Gorby, *The West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. Mar. J. of Prac. and Proc. 605, 662 (1976). *See also* J. Burtchaell, *Die Buben sind unser Ungluck! The Holocaust and 'Abortion,'* in Rachel Weeping and Other Essays on Abortion, 141 (1982).

The dangers of the unwanted child and child abuse have been put forth. "The unwanted minority and mixed race children now spend blighted lives . . . ," *Beal*, 432 U.S. at 456 (Marshall, J., dissenting) and "absent day care facilities" they force their mothers "into full time child care." *Id.* at 458.

In order to justify abortion on such grounds, as "absent day care facilities," one must totally separate oneself from reality and judge *potential* and imagined violence or deprivation to a child later in life as more real than the real flesh and blood violence which ends the child's life, and the actual psychological violence which hounds the woman and her surviving children in later years. Calef, *The Hostility of Parents to Children: Some Notes on Infertility, Child Abuse and Abortions*, 1 Intl. Journ. of Psychoanalytic Psychotherapy 79 (1972). The policy in time will give way to cruelty and come readily to consent to the removal of the original object of concern -- the poor themselves.

The data seem to indicate that abortion exacerbated problems of child abuse by destroying the bonding process between mother and infant and in other ways. Ney, *Is elective abortion a cause of child abuse?* 4 Sexual Medicine Today 31 (June 1980); Ney, *Relationship*

between Abortion and Child Abuse 24 Can. Journ. of Psychiatry 620 (1980).

The devaluing of the child *in utero* is increasing psychological and physical problems for all, mothers and children. Kent, *Emotional Sequelae of Therapeutic Abortion: A Comparative Study*, 20 Brit. Colum. Med. Journ. 118 (1978); Kumar and Robson, *Previous Induced Abortion and Antenatal Depression in Primiparae*, 8 Psychological Medicine (1978).

"While suicide . . . is not unknown as a reaction to abortion, it is almost unknown among pregnant women and even among new unmarried mothers." S. Rep. No. 465, *supra* at 43. Contrast the actual empirical data with the assertion in *McRae*, 448 U.S. at 340 (Marshall, J., dissenting) that the result of no abortion funding "may be suicide." *See also* Tishler, *Adolescent Suicide Attempts Following Elective Abortion: A Special Case of Anniversary*, 1981 Pediatrics 670.

The indications are that where abortion is widespread, infant mortality is increasing and higher than in those areas where normal, natural childbirth is the rule. For example, Washington D.C. has the highest repeat abortion rate in the country, S. Rep. No. 465, *supra*, and *City Infant Mortality Rate Rises*, The Washington Post, June 19, 1981. *See also* Levin, *Association of Induced Abortion with Subsequent Pregnancy Loss*, June 27, 1980, J. A. M. A., 2495; Iffy, *Perinatal Statistics: The Effect Internationally of Liberalized Abortion*, New Perspectives, *supra* at 92-127.

A study by Thomas W. Hilgers, M.D. and Dennis O'Hare, *Abortion Related Maternal Mortality: An*

> . . . It is a bit like saying 'stock fraud and speculation in stocks, when stripped of the sensitive moral arguments surrounding them, are simply two alternative financial methods of dealing in the stock market.' When moral sensitivities are eliminated how do you distinguish good procedures from bad? . . . Is this so far from writing, 'Life is unquestionably a condition requiring medical services . . . Treatment for the condition may involve medical procedures for its termination or its continued support? 'Certainly the bland equation of life or death as two alternative and acceptable outcomes is shocking to the least tender conscience. Noonan, *A Half Step Forward: The Justices Retreat on Abortion,* Fall 1977 The Human Life Review, 11, 12, 16.

However, in the deliberately chosen starvation of the Bloomington baby, Infant Doe, the ". . . lawyer concocted an Orwellian euphemism for this refusal of potentially life-saving treatment -- 'treatment to do nothing.' " Will, *The Killing Will Not Stop,* The Washington Post, April 22, 1982, at A29, col. 3.

But stripped of the changing social engineering justifications of that "another world out there," *Beal* 432 U.S. at 463 (Blackmun, J., dissenting), there is an assertion of privacy as the basis of this judge-made right.

Legal commentators, regardless of their position on abortion, quickly pointed out the flimsy nature of

In-Depth Analysis, New Perspectives, *supra* at 90 has found that "natural pregnancy was found to be safer in both the first and second 20 weeks of pregnancy" than legal abortion. Contrast this actual empirical data of 1981 with the 1973 assertion of "the now established medical fact of safety" of abortion over natural pregnancy, *Roe v. Wade*, 410 U.S. at 163.

John Cardinal Newman writes about a hidden danger in an excessive reading of novels -- the habitual arousing of noble impulses to action with no real object or healthy outlet. In this way, an individual jaundices himself by experiencing emotional heights and depths without needing to involve himself in mental judgment or commitment or action. Right feeling never comes to inform right action. Thus the individual concerns himself with whether he has *feelings* of pity, righteous anger and charity, rather than whether he allows his feelings to inform *moral acts*.

Three of the dissenting opinions in *McRae*, 448 U.S. at 329 (Brennan, J., Marshall, J., and Blackmun, J., dissenting) are replete with such proper feelings, yet the morality of the act of abortion is avoided.

Indeed one is treated again to: "Abortion and child birth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy . . ." *McRae*, 448 U.S. at 332-333 (Brennan, J., dissenting; quoting *Beal*, 432 U.S. at 449.)

Professor John Noonan has noted, of this repeated statement:

a *privacy* rationale. J. O'Meara, in *Abortion: The Court Decides a Non-Case*, 1974 Supreme Court Review 337, 340, wrote, "there is nothing private about an abortion" and Ely, *supra*, at 932, observed that the detriments of pregnancy cited by the Court have "nothing to do with privacy in the Bill of Rights or any other sense the Constitution suggests."

The commentators, however, overlook the underlying logic of the *privacy* rationale, given the nature of the *act* of abortion. It is understandable that *privacy* be proclaimed as its basis, for *privacy* is a "peculiar school of thought" for such an act.

> . . . of all human pursuits murder has the most deadly need of privacy; . . . man will go to almost any lengths to preserve the solitude in which he evacuates or makes love but he will go to any length for that in which he takes life, even to homicide, yet by no act can he more completely and irrevocably destroy it . . ." W. Faulkner, *Intruder in the Dust* 57 (1948).

The foregoing experiences with judicial legislating on unsound theory should be kept in mind before answering the questions posed by what to do with the remains of aborted human beings.

Can the elected legislature make provisions for the humane disposal of aborted human remains? Can the elected legislature prevent the use of aborted human remains for experimentation or in the manufacture of cosmetics? Thimmesch, *Our grisly human fetal indus-*

try, Victoria Advocate, Dec. 18, 1981. Can trafficking in aborted human remains be prohibited? Will *Roe v. Wade* now be read to demand judicial prohibition of legislative responses to the problems of the disposal of the remains of discarded individual human life?

The judicial and judicious answer is that the appropriate branch of government, a legislature, must so provide for the humane disposal of aborted human remains. S. Rep. No. 465, *supra* at 4, 5.

A "substantive due process" answer is of course by its nature arbitrary and not so predictable. Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 Supreme Court Review 159; Viera, *Roe and Doe: Substantive Due Process and the Right of Abortion*, 25 Hastings L. J. 867 (1974).

The unforeseen impact and result of the Court's "substantive due process" abortion legislation and the eroding factual base upon which the regulations were so enacted indicate it is time we begin to journey back to a sane and rational jurisprudence that respects the constitutional separation of powers. S. Rep. No. J-97-16, *supra*; S. Rep. No. 465, *supra*.

"Substantive due process" -- an oxymoron -- should once again be laid to rest. Humane recognition of our own is clearly within the power of the legislature. It is a Constitution not a *Zeitgeist* this Court is charged to interpret, and it is that duty to which the Court is urged to return. Article III creates a judiciary, not a peerage.

III. Conclusion

The passage of time cannot cure "an improvident and extravagant exercise of the power of judicial review" made without "authority," *Roe* v. *Wade*, 410 U.S. at 221-222 (White, J., dissenting); and "judicial legislation," *Id.* at 174 (Rehnquist, J., dissenting), like all legislation, is subject to becoming outdated rapidly.

Nine years after *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), the Constitution was still "color blind," (Harlan, J., dissenting); and nine years after *Roe* v. *Wade* the "exercise of raw judicial power," *Id.* at 221-222 (White J., dissenting) is still raw and eroding the authority upon which judicial power must ultimately rest.

To come before the Court and say the truth is to be a friend of the Court.

It is a lack of respect for the Court in argument to attempt to intellectualize the irrational and overreaching "substantive due process" categories which the unconstitutional *Roe* v. *Wade* blandly states.

A case regularly criticized in law reviews, *see* S. Rep. No. 465, *supra* at 34 and critical articles cited therein; J. Noonan, A Private Choice: Abortion in America in the Seventies, 20-32 (1979), and a topic of lampooning in law classes across the country cannot be salvaged by obsequious fawning, masking itself as scholarship. It should be and will be disavowed.

At the very least though, at this time we should expect a legal recognition of that most fitting and

proper right to respect and humanely care for the human life sacrificed.

Whether this Court will be allowed to seize upon this opportunity to begin to properly interpret the Constitution by limiting or disavowing the unconstitutional *Roe v. Wade* is not a matter within the powers of the Court or those before it. Not just because of the power and sway of vested error, by comparison to which vested wealth is naught, but more because the blood, guilt, and accumulated self-hatred of nine years is heard.

"Then I shall make Pharoah's heart stubborn and he will set out in pursuit of them. But I shall win glory for myself at the expense of Pharoah and all his army and the Egyptians will learn I am Yahweh." *Exodus* 14:4.

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